

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	10
Conclusion	19

CITATIONS

Cases:

Alford v. *United States*, 282 U. S. 687 — 12

Bogy v. *United States*, 96 F. (2d) 734, certiorari denied, 305 U. S. 608 — 15

Bradford v. *United States*, 129 F. (2d) 274, certiorari denied, 317 U. S. 683 — 14

Brady v. *United States*, 26 F. (2d) 400, certiorari denied, 278 U. S. 621 — 15

Gantz v. *United States*, 127 F. (2d) 498, certiorari denied, 317 U. S. 625 — 15

Glasser v. *United States*, 315 U. S. 60 — 12, 17, 18

Hargrove v. *United States*, 25 F. (2d) 258 — 17

Hastings v. *Hudspeth*, 126 F. (d) 194, certiorari denied, 316 U. S. 692 — 15

Johnson v. *United States*, decided February 13, 1943 — 19

Kettenbach v. *United States*, 202 Fed. 377, certiorari denied, 229 U. S. 613 — 17

McIntyre v. *United States*, 49 F. (2d) 769 — 15

Morrissey v. *United States*, 67 F. (2d) 267, certiorari denied, 293 U. S. 566 — 17

Newingham v. *United States*, 4 F. (2d) 490, certiorari denied, 268 U. S. 703 — 15

New York Transportation Co. v. *Garside*, 157 Fed. 521 — 17

Tincher v. *United States*, 11 F. (2d) 18, certiorari denied, 271 U. S. 664 — 15

United States v. *Breen*, 96 F. (2d) 782, certiorari denied, 304 U. S. 585 — 17

United States v. *Gross*, 103 F. (2d) 11 — 17

United States v. *Kay*, 101 F. (2d) 270, certiorari denied, 306 U. S. 660 — 17

531144—43——1

Cases—Continued.	Page
United States v. *Kenofskey*, 243 U. S. 440	14
United States v. *Manton*, 107 F. (2d) 834, certiorari denied, 309 U. S. 664	12
United States v. *Ross*, 92 U. S. 281	15
Weiss v. *United States*, 120 F. (2d) 472, certiorari denied, 314 U. S. 687	15
Statute:	
Section 215 of the Criminal Code (18 U. S. C. 338)	2
Miscellaneous:	
III Wigmore, *Evidence* (3d ed., 1940), sec. 748	17
III Wigmore, *Evidence* (3d ed., 1940), sec. 784	17
IV Wigmore, *Evidence* (3d ed., 1940), sec. 1316, p. 630	13
V Wigmore, *Evidence* (3d ed., 1940), sec. 1679, p. 763	13

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1037

ARTHUR A. STEINER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority opinion in the circuit court of appeals (R. 1460–1466) and the special concurring opinion of Judge Hutcheson (R. 1467–1468) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 29, 1943 (R. 1468), and a petition for rehearing (R. 1469–1473) was denied April 24, 1943 (R. 1474). The petition for a writ of certiorari was filed May 20, 1943. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules, promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in the admission and exclusion of evidence.

2. Whether the evidence sufficiently supported the allegations in counts 1 and 2 of use of the mails in furtherance of the alleged scheme to defraud.

3. Whether the trial court committed reversible error in his interrogation of witnesses.

4. Whether petitioner's constitutional rights were infringed by the trial court's practice of having counsel approach the bench for brief discussions of legal questions.

STATUTE INVOLVED

The mail fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package,

writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner and two others, James R. Stewart and Esther E. Stein, were convicted on June 19, 1942, in the District Court for the Eastern District of Louisiana on all but the third count of a six-count indictment charging them with violations of the mail fraud statute (R. 3–20, 48).[1] Petitioner was sentenced to pay a fine of $500 on each of the five counts, aggregating $2,500, and one-third of the costs of prosecution, and to serve

[1] The third count of the indictment had been dismissed upon motion of the Government (R. 698).

a period of 7 years' imprisonment under counts 1 and 2 and a consecutive 7-year period of imprisonment under counts 4, 5, and 6, execution of the latter 7-year period being suspended and the petitioner placed on probation for five years provided he comply with certain conditions (R. 53–55). On appeal by petitioner alone, his conviction was affirmed (R. 1460–1468).

Petitioner does not question the sufficiency of the evidence to establish the scheme to defraud alleged in the indictment. That scheme, which the court below described as "a fraud of the most reprehensible kind" (R. 1461), may be briefly summarized as follows: Petitioner, an attorney, would solicit tax assessment reduction business for a fee of one-half the amount he saved for the taxpayer. The solicited tax assessment reduction would be fraudulently effected by the defendant Stewart, who was the chief clerk of the New Orleans office of the Louisiana Tax Commission. The defendant Stein, a notary public, acted as a "go between" between petitioner and the defendant Stewart. The fee charged by petitioner would be divided 25 percent to petitioner, 25 percent to Stein, and 50 percent to Stewart. Execution of the fraudulent scheme on a large scale continued from 1936 to and including part of 1939 and resulted in huge profits to the defendants.

The allegations contained in counts 1 and 2 of use of the mails in furtherance of the scheme, and

the evidence adduced in support thereof, may be summarized as follows:[2]

Count 1. Count 1 alleged that on or about January 4, 1939, at New Orleans, Louisiana, the defendants mailed and caused the mailing of a statement dated December 31, 1938, on the bill head of "Steiner & Stein" to Longino & Collins, 3821 Tulane Avenue, New Orleans, Louisiana, for "services rendered personal taxes 1938, $1,129.22" (R. 10–11). This statement to Longino & Collins (R. 985), which was one of the firms for whom the defendants fraudulently secured a tax assessment reduction (R. 232), was introduced in evidence, together with the envelope to which it was attached with a pin when found in the files of Longino & Collins (R. 420–421, 985).[3] The envelope was postmarked at New Orleans on January 4, 1939 (R. 985). The billhead and envelope were exact duplicates, as to size, style of type and paper, of the billheads and envelopes which petitioner admitted to the witness Wilkinson were used by the defendants as "part of the system" and sent out by Stewart (R. 229–232, 280–285).

Count 2. Count 2 alleged that the defendants mailed and caused the mailing of a letter at New

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[2] Petitioner does not question the sufficiency of the evidence to show the mailings alleged in counts 4, 5, and 6.

[3] The United States Attorney stated in this brief filed in the court below that the envelope and statement had been pinned together for a considerable time, for the pinholes were rusty. Nothing in the record shows this, however, for the original exhibits are not before this Court.

Orleans, Louisiana, to the Intertype Corporation, 360 Furman Street, Brooklyn, New York, on February 12, 1938, in which petitioner solicited a fee from the corporation for service in connection with the reduction of the corporation's 1937 personal tax assessment and in which he enclosed a corrected bill therefor. The letter requested a check by "return mail" (R. 12–13). This letter (R. 1241) was introduced in evidence without objection by the defendants (R. 622) and two employees of the corporation testified that it had been received through the mail and was stamped with the company's incoming mail stamp, showing receipt on February 14, 1938, two days after it was written (R. 621–622, 634–635, 1241). The letter had been dictated by petitioner to his secretary in his office in New Orleans, typed, placed on petitioner's desk in his office for mailing, and signed by petitioner (R. 631–632).

Hugh M. Wilkinson, an attorney, related at the trial a complete confession petitioner made to him in February 1939 of the details of the fraudulent scheme in which the defendants were engaged (R. 189–232).[4] Before this testimony was admitted in evidence, however, petitioner objected to allowing Wilkinson to testify to any conversation between him and petitioner, on the ground that the relationship of attorney and client ex-

[4] Petitioner also revealed the general structure of the fraudulent scheme to another attorney, who testified at the trial (See R. 275–279).

isted between them and their conversations were therefore privileged (R. 117–118). The court thereupon dismissed the jury and heard evidence to determine whether the relationship of attorney and client had in fact existed (R. 118–188). At the conclusion of this evidence, the court stated that "to the Court's entire satisfaction there has been proved beyond a reasonable doubt (much more than the preponderance of the evidence) the fact that a relationship of client and attorney never did exist" (R. 185; see also, R. 187–188). The evidence upon which this finding was based may be briefly summarized as follows:

In 1939 Mr. Wilkinson was a member of the Board of Governors of the State Bar of Louisiana, elected from the first congressional district (R. 144). This board, by statute, had power, as petitioner indicates (Pet. 11, n. 10), to receive and investigate complaints as to the conduct of members of the bar and to make findings and recommendations to the legally constituted disbarment authorities.

Petitioner testified that on February 6, 1939, he went to Wilkinson's office and told Wilkinson the whole story of the fraudulent scheme in which he and the defendants Stein and Stewart were engaged and later gave Wilkinson documentary proof thereof, because he wanted Wilkinson, as an attorney, to stop Miss Stein from harassing him for her share of some of the proceeds from the scheme which he had withheld from her. Pe-

531144—43——2

titioner also stated that he did not go to see Wilkinson as a member of the Board of Governors of the State Bar of Louisiana, but that he said nothing to Wilkinson about a fee for representing him. (R. 121–143.)

Wilkinson's testimony was as follows: Petitioner opened up his February 6, 1939, visit by telling him he was in trouble and that the best thing for him to do was to resign as a member of the State Bar and go into the real-estate business (R. 144–145, 154). Wilkinson told petitioner very early in the conversation that he was a member of the Board of Governors of the State Bar, as petitioner well knew, and that he would have to make an investigation and report petitioner if he was engaged in any improper professional misconduct (R. 145–146). Petitioner told him the whole story, however, also implicating other attorneys who were engaged in the same practice in the Tax Commission office and on a larger scale (R. 144–145, 147, 156, 159, 165). Wilkinson sought corroboration of petitioner's statements (R. 147) and suggested to petitioner that, although he had no authority to bind either the Board of Governors of the State Bar of Louisiana or the Supreme Court or any district attorney, he would give him a personal recommendation of leniency, for whatever it would be worth, if petitioner would cooperate with him in bringing to light the true facts regarding the transactions in the Tax Commission office, both

as to petitioner's own part and that of other attorneys (R. 164–167). Petitioner aided Wilkinson in securing evidence (R. 148–153), which Wilkinson later submitted to the State Board of Governors (R. 148). Petitioner in the meantime submitted his resignation from the bar of the State Supreme Court (R. 146) and Wilkinson, a week or so later, sent out pamphlets and made a radio address, at his own expense, urging cooperation of the businessmen in connection with his investigation of the illegal transactions being conducted in the Tax Commission office (R. 159–162, 163). Nothing was ever said about Wilkinson representing petitioner as his attorney and petitioner knew that Wilkinson could not do so in view of his official position and knowledge that petitioner was engaged in professional misconduct (R. 146–147, 153). Wilkinson later informed the State Board concerning his assurance to petitioner that he would recommend leniency in his case, and Wilkinson did, in fact, tell the board that he thought petitioner was entitled to some consideration, although he had later tried to frustrate the Tax Commission investigation (R. 167).

Two of Wilkinson's associates, John D. Lambert and A. Miles Coe, who were with Wilkinson and petitioner when petitioner obtained certain evidence for Wilkinson, both testified that petitioner came to Wilkinson in his official capacity as a member of the Board of Governors

of the State Bar. Lambert also stated that petitioner sought a recommendation of leniency from Wilkinson (R. 169–185).

ARGUMENT

I

Petitioner's contentions that the district court committed a number of prejudicial errors in the admission and exclusion of evidence are lacking in merit.

A. Contradictorily, petitioner asserts that his confession to Wilkinson should have been excluded from evidence because (1) the conversations between petitioner and Wilkinson were privileged by virtue of an attorney-client relationship (Pet. 27–28) and (2) Wilkinson was a law enforcement officer who induced petitioner's confession by "promises, inducements, and hope of reward" (Pet. 11–15).

In respect of the first point, petitioner argues merely that the court below failed to apply the rule of "reasonable doubt" to the evidence adduced at the preliminary hearing conducted to determine whether the attorney-client relationship had in fact existed. But petitioner has no cause for complaint in this connection, for the district judge who heard the evidence plainly indicated that he disbelieved petitioner's testimony and twice stated that he was convinced beyond a reasonable doubt that the relationship of attorney

and client had not existed between petitioner and Wilkinson (R. 185, 187–188). The evidence adduced at the hearing, summarized *supra,* pages 8–10, patently supports the court's conclusion.

After the preliminary hearing had been held on the question of privilege and Wilkinson was recalled to the stand in the presence of the jury, petitioner objected to allowing Wilkinson to testify to "any act of guilt as against" petitioner, on the ground "that a proper foundation must be laid and it must be shown that no inducement, threat, hope or anything else was made to" petitioner "to make such admission or statement" (R. 190). Since the court had just heard evidence on the circumstances surrounding petitioner's confession of guilt to Wilkinson, another preliminary hearing on the matter was not required. Petitioner, contending that he had consulted Wilkinson as an attorney, had testified that during his first interview with Wilkinson he voluntarily disclosed the details of the fraudulent scheme in which he, Stein and Stewart were engaged and thereafter supplied Wilkinson with corroborating evidence thereof. Wilkinson was not a law enforcement officer and petitioner, an attorney, knew that all Wilkinson could do for him, as Wilkinson testified he suggested to him, was to give him his personal recommendation of leniency, which he later did. Even this suggestion of a recommendation of leniency was made after petitioner had

confessed his guilt to Wilkinson. (*Supra,* pp. 2.) The situation clearly was not such as to render petitioner's confession inadmissible in evidence against him in a federal prosecution.

B. Petitioner also contends that he was prejudiced by the district court's refusal to allow him to cross-examine Wilkinson to show his bias, interest and prejudice (Pet. 29–30). The sole instance to which petitioner refers, as appears from his brief in the court below, pages 158–160, which he has filed with this Court, is the court's refusal to allow him to question Wilkinson about a political address Wilkinson made on December 19, 1938 (R. 242–244), almost two months before petitioner allegedly consulted him as an attorney and confessed his guilt to him. The extent of cross-examination rested in the sound discretion of the district court[5] and that discretion manifestly was not abused in this instance. Moreover, the court had previously allowed cross-examination relative to this and other public addresses made by Wilkinson (See R. 234–238).

C. Petitioner's contention that he was prejudiced by proof of offenses "extra the indictment" (Pet. 28–29) requires little discussion. The alleged objectionable evidence in this respect was the proof that the defendant Stewart, rather than

[5] *Glasser* v. *United States*, 315 U. S. 60, 83; *Alford* v. *United States*, 282 U. S. 687; *United States* v. *Manton*, 107 F. (2d) 834, 845 (C. C. A. 2), certiorari denied, 309 U. S. 664.

petitioner, in two instances solicited some of the tax assessment reduction business. Petitioner asserts that this was a solicitation by Stewart on his own account, rather than as a member of the partnership with Stein and petitioner (Pet. 28). If so, petitioner was not prejudiced by the evidence, for the court's instructions to the jury required the jury to disregard evidence of separate and distinct offenses by any of the defendants which were not connected with the scheme alleged in the indictment (See R. 767).

D. The contention that copies of income-tax returns, admittedly duly authenticated pursuant to statute (28 U. S. C. 661), are inadmissible in evidence unless they are identified by a witness (Pet. 20–21) is, of course, frivolous. "The whole purpose of authentication * * * is to avoid the inconvenience and expense of calling witnesses in the ordinary way to prove that which is seldom fairly disputable. The formalities so available * * * by statute are * * * prescribed * * * as substitutes for a more tedious and undesirable method" (V Wigmore, *Evidence* (3d ed., 1940), sec. 1679, p. 763; see also, *ibid.* Vol. IV, sec. 1316, p. 630).

II

Petitioner's contentions that the mailings alleged in counts 1 and 2 occurred after the consummation of the alleged scheme to defraud (Pet. 25–26) and that the mailings were insufficiently estab-

lished by the evidence (Pet. 21–25) are also clearly lacking in merit.

A. Petitioner appears to contend that the alleged scheme to defraud was consummated each time a fraudulent tax assessment reduction was effected and that the scheme was not continuous because each count of the indictment was treated as a separate offense (Pet. 25–26). The fact that each separate use of the mails in furtherance of a scheme to defraud is a separate offense does not, of course, in any way affect the continuity of the scheme itself. The various counts of the indictment (R. 3–20) plainly charge the same, *continuing,* scheme to defraud the taxpayers of the State of Louisiana and its agencies by making illegal tax assessment reductions, and petitioner does not deny that the evidence showed that the same scheme was executed innumerable times from 1936 to 1939. As the court below stated (R. 1462), "The mailing of letters and statements to clients for the collection of fees was a necessary, indeed indispensable, element of that scheme, for without money to bribe Stewart and divide with Stein and Steiner the partnership would have failed." The mailing of the statement alleged in count 1 and of the collection letter alleged in count 2 were therefore intimately connected with the continuation of the fraudulent scheme and, hence, in furtherance thereof. Cf. *United States* v. *Kenofskey,* 243 U. S. 440, 443; *Bradford* v. *United States,* 129 F.

(2d) 274, 276 (C. C. A. 5), certiorari denied, 317 U. S. 683; *Hastings* v. *Hudspeth*, 126 F. (2d) 194, 196 (C. C. A. 10), certiorari denied, 316 U. S. 692; *Weiss* v. *United States*, 120 F. (2d) 472, 475 (C. C. A. 5), certiorari denied, 314 U. S. 687; *Bogy* v. *United States*, 96 F. (2d) 734, 740 (C. C. A. 6), certiorari denied, 305 U. S. 608; *Brady* v. *United States*, 26 F. (2d) 400, 401 (C. C. A. 9), certiorari denied, 278 U. S. 621; *Tincher* v. *United States*, 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Newingham* v. *United States*, 4 F. (2d) 490, 492 (C. C. A. 3), certiorari denied, 268 U. S. 703.

B. The proof of the uses of the mail alleged in counts 1 and 2 clearly was sufficient. The count 1 mailing, consisting of a statement for services rendered for reduction of Longino & Collins' tax assessment, was found in the files of that company, pinned to an envelope bearing a New Orleans postmark. Both the statement and envelope were identical to those which petitioner admitted were used by the defendant Stewart as part of their scheme. (*Supra*, p. 5.) This was sufficient circumstantial evidence of mailing (cf. *Gantz* v. *United States*, 127 F. (2d) 498, 502 (C. C. A. 8), certiorari denied, 317 U. S. 625; *McIntyre* v. *United States*, 49 F. (2d) 769 (C. C. A. 6)) and did not, as petitioner contends (Pet. 22), improperly establish the mailing only by a presumption upon a presumption (see *United*

States v. *Ross,* 92 U. S. 281, 283–284). The count 2 mailing was dictated by petitioner to his secretary, typed by the secretary, given to petitioner for mailing, signed by petitioner, and received in New York City by the Intertype Corporation two days later. Two employees of the corporation testified that it was received through the mails. (*Supra,* p. 6.) Since the letter was received by the company in New York City within two days after it was written in New Orleans, the evidence was clearly sufficient to warrant the inference that it was sent through the mails, regardless of whether, as petitioner contends (Pet. 24–25), the direct testimony of receipt through the mails was merely opinion evidence.

III

Petitioner complains that the trial court propounded to the witness Chadwick a series of questions which were argumentative, leading, suggestive, and improper repetition of testimony already given (Pet. 15, 31–35) and that the court "was most active in questioning witnesses throughout the trial, and with few exceptions acted on the side of the prosecution" (Pet. 16). The record reveals that petitioner's objection at the trial to the series of questions directed to the witness Chadwick was made after the court concluded his questioning of the witness and then on the ground that the questions were leading (Pet. 34; R. 600), and that petitioner raised no objection

whatever in the instances he cites (Pet. 16) for his statement that the court acted on the side of the prosecution.[7]

It is well settled, of course, that the district judges have the right to interrogate witnesses in the interest of eliciting the truth and a full disclosure of all material facts,[8] that the extent of their participation in such interrogation is a matter within their sound discretion,[9] and that it is their right and duty, if they feel the need of information, to examine in the best way calculated to produce a disclosure of all the facts.[10] A review of the instances in which the court questioned witnesses in the present case reveals that, as the court below stated (R. 1466), the district court "showed no partiality in his questioning and did not assume the role of prosecutor" and that the court's questions were at times helpful in

[7] In one instance, petitioner objected to a question on the ground it called for opinion evidence, but the question was clearly not subject to objection on that ground (See R. 556).

[8] *Glasser* v. *United States*, 315 U. S. 60, 82; *United States* v. *Gross*, 103 F. (2d) 11, 13 (C. C. A. 7); *United States* v. *Breen*, 96 F. (2d) 782, 784 (C. C. A. 2), certiorari denied, 304 U. S. 585; *Hargrove* v. *United States*, 25 F. (2d) 258, 259 (C. C. A. 8); *Kettenbach* v. *United States*, 202 Fed. 377, 385 (C. C. A. 9), certiorari denied, 229 U. S. 613; III Wigmore, *Evidence* (3d ed., 1940), sec. 748.

[9] *United States* v. *Kay*, 101 F. (2d) 270, 272 (C. C. A. 2), certiorari denied, 306 U. S. 660; *New York Transportation Co.* v. *Garside*, 157 Fed. 521, 524 (C. C. A. 2); see also *Morrissey* v. *United States*, 67 F. (2d) 267 (C. C. A. 9), certiorari denied, 293 U. S. 566.

[10] III Wigmore, *Evidence* (3d ed., 1940), sec. 784.

bringing forth answers altogether favorable to petitioner. And, even though petitioner made no objection during the trial to any of the court's questions on the ground that they were partial to the prosecution, the court carefully instructed the jury at length, on two occasions, that they were not to draw any conclusions from his attitude in questioning witnesses (See R. 753–754, 764). This clearly corrected any possible prejudice to petitioner. Cf. *Glasser* v. *United States,* 315 U. S. 60, 83.

IV

The trial court, early in the trial, told the jury that it was his practice to expedite matters of law, with which the jury was not concerned, by calling counsel to the bench rather than retiring the jury every time a question of law was discussed briefly by counsel (R. 86–87). This procedure was followed throughout the trial and petitioner at no time objected to it. He now contends that the procedure resulted in the denial of his constitutional rights to a public trial, the assistance of counsel, and to be present at every stage of the trial (Pet. 17–20). The practice of calling counsel to the bench for short discussions in *sotto voce* is a common practice which in no way detracts from the public nature of the trial or from the ability of counsel to represent the accused. The fact that petitioner could not hear the legal discussions did no violence to any of his

constitutional rights (Cf. *Johnson* v. *United States,* No. 273, decided February 13, 1943) and he manifestly was not prejudiced by a procedure to which he did not even object.

CONCLUSION

The case was correctly decided below and involves no conflict of decisions or important question of law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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